Are Now-Adverse Former Corporate Executives Entitled to See Their Own Files?

Thomas E. Spahn (tspahn@mcguirewoods.com) is a partner with McGuireWoods LLP in Tysons Corner, Virginia. Tom practices as a commercial litigator and regularly advises clients on ethics issues including conflict of interest, confidentiality, and dealing with corporate wrongdoing. He is a frequent lecturer on legal ethics and privilege issues, and among numerous other publications is the author of The Attorney-Client Privilege and the Work Product Doctrine: A Practitioner's Guide published by the Virginia Law Foundation. Tom has spoken at more than 1,000 CLE programs throughout the United States and in several foreign countries, and has served on the ABA Standing Committee on Ethics & Professional Responsibility.

In his September 24, 2014 “Privilege Points” release, Tom Spahn discusses former corporate employees’ access to their files containing corporate privileged communications:

Courts vehemently disagree about now-adverse former corporate executives' right to see privileged documents that were in their possession when they worked at the company. A 1987 Delaware decision provided such access. Kirby v. Kirby, Civ. A. No. 8604, 1987 Del. Ch. LEXIS 463 (Del. Ch. July 29, 1987) (not released for publication). In 2005, the Montana Supreme Court even condemned the opposite approach as "perverse." Inter-Fluve v. Mont. Eighteenth Judicial Dist. Court, 112 P.3d 258, 264 (Mont. 2005).

In Las Vegas Sands Corp. v. Eighth Judicial District Court, 331 P.3d 905 (Nev. 2014), the Nevada Supreme Court took what Montana called the "perverse" view — but which seems much more logical. A company's CEO took 40 gigabytes of documents with him when he left. After examining both sides of the issue, the court concluded that "the modern trend in caselaw" denies access to now-adverse former employees. Id. at 913. The court explained that allowing former executives "to access and use privileged information after he or she becomes adverse to the corporation" is inconsistent with the privilege’s purpose. Id. In an undoubtedly unintended swipe at the Montana analysis, the court concluded that providing such access "would have a perverse chilling effect on candid communications between corporate managers and counsel." Id.

Although the trend favors corporations’ right to deny former employees access to their privileged communications, the debate probably will continue.